

Before the
FEDERAL TRADE COMMISSION
Washington, DC 20580

In the Matter of

TRUSTe Application for Modifications to
Safe Harbor Program Requirements

Project No. P024526

COMMENT AND REQUEST FOR INVESTIGATION

The Center for Digital Democracy (“CDD”)¹ and Campaign for a Commercial-Free Childhood (“CCFC”),² by their attorneys, the Institute for Public Representation, respond to the Federal Trade Commission’s (“FTC” or “the Commission”) request for comment on proposed changes to TRUSTe’s COPPA Safe Harbor program.³

TRUSTe has sought approval of changes to its COPPA Safe Harbor program that it states are necessary to comply with an Assurance of Discontinuance it recently entered into with the

¹ CDD is a DC-based nonprofit organization committed to protecting consumers in the digital marketplace. CDD’s advocacy for internet privacy in the 1990s (when it operated as the Center for Media Education) led to Congress’s 1998 adoption of COPPA. CDD also actively participated in the FTC’s proceeding to update the COPPA rule, frequently comments on safe harbor applications, and filed many requests asking the FTC to investigate apparent violations of the COPPA rule.

² CCFC is a national advocacy organization dedicated to countering the harmful effects of commercialism on children. CCFC organizes campaigns against corporations that target children with harmful marketing, helps parents and professionals reduce the amount of time kids spend with ad-supported screens, and advocates for policies that limit marketers’ access to children. CCFC has filed a number of Requests for Investigation with the Commission for violations of COPPA and Section 5 of the FTC Act.

³ Children’s Online Privacy Protection Rule Safe Harbor Proposed Self-Regulatory Guidelines; TRUSTe COPPA Safe Harbor Program Application To Modify Program Requirements, 82 Fed. Reg. 19009 (April 25, 2017) [*hereinafter* Notice]. These comments address question (4) which requests comments on any other issue that is relevant to TRUSTe’s Safe Harbor program.

New York Attorney General’s Office (“NYAG”).⁴ While the proposed changes themselves do not appear objectionable, the facts leading up to this proposal strongly suggest that TRUSTe has violated its 2015 Consent Decree with the FTC by misrepresenting its practices for assessing operators of child-directed online services (“Operators”).

CDD and CCFC ask the FTC to conduct an investigation of TRUSTe to determine if it has in fact violated the Consent Decree, and if so, to take all available enforcement action against TRUSTe. Further, to protect the privacy of children pending the outcome of the investigation, they ask the FTC to suspend TRUSTe’s COPPA Safe Harbor program.

I. Background

Under the safe harbor provision of the COPPA Rule, program administrators must demonstrate that their safe harbor program ensures that Operators “provide substantially the same or greater protections for children as those contained in the COPPA Rule.”⁵ In order to do that, the program must have an “effective, mandatory mechanism” for the administrator to conduct an annual assessment of each Operator’s policies, practices, and representations.⁶

TRUSTe is one of seven companies that the FTC has granted the ability to administer a safe harbor program under the COPPA Rule.⁷ TRUSTe was first granted authority to operate a safe harbor program in May 2001.⁸ TRUSTe updated its COPPA Safe Harbor program in June

⁴ Submission of TRUSTe’s Proposed Post-Approval Modifications to its Children’s Privacy Program under 16 CFR §312.11(e), at 3 (Mar. 22, 2017), https://www.ftc.gov/system/files/attachments/press-releases/ftc-seeks-comment-proposed-changes-trustes-coppa-safe-harbor-program/truste_childrens_privacy_program_amendments_31211e_ftc_submission_package_22_mar2017.pdf [*hereinafter* TRUSTe Application].

⁵ 16 C.F.R. 312.11(b)(1).

⁶ 16 C.F.R. 312.11(b)(2).

⁷ COPPA Safe Harbor Program, FTC, <https://www.ftc.gov/safe-harbor-program> (last visited May 23, 2017).

⁸ Notice at 19010.

2013 to meet new standards the FTC adopted into the COPPA Rule revision, and the FTC approved these changes in July 2013.⁹

Sometime thereafter, the Commission began an investigation into TRUSTe's certification practices. In a complaint, the FTC alleged that TRUSTe represented that it "has recertified annually all companies displaying a TRUSTe Certified Privacy Seal to ensure ongoing compliance with the Program Requirements."¹⁰ However, "from 2006 until January 2013, [TRUSTe] did not conduct annual recertifications for all companies holding TRUSTe Certified Privacy Seals. In over 1,000 instances, TRUSTe conducted no annual review of the company's compliance with applicable Program Requirements."¹¹ The complaint also alleged that TRUSTe was perpetuating its misrepresentation that it was a non-profit entity.¹² In November 2014, the FTC solicited comments on its proposed Consent Decree with TRUSTe.¹³ In response, CDD and CCFC requested that the FTC strengthen certain provisions in the Consent Decree.¹⁴ In March 2015, TRUSTe entered into a Consent Decree with the FTC that did not reflect the requested changes.¹⁵

In the Consent Decree, TRUSTe agreed not to misrepresent (1) the steps it takes to evaluate, certify, review, or recertify its Operators; (2) the frequency with which it conducts its

⁹ *Id.*

¹⁰ *In the Matter of True Ultimate Standards Everywhere, Inc.*, Complaint, Docket No. C-4512, FTC 4 (Nov. 17, 2014).

¹¹ *Id.*

¹² *Id.* at 5.

¹³ *In the Matter of True Ultimate Standards Everywhere, Inc.*, Analysis of Proposed Consent Order to Aid Public Comment, File No. 132 3219 (Nov. 17, 2014), <https://www.ftc.gov/system/files/documents/cases/141117trusteanalysis.pdf>.

¹⁴ CDD & CCFC, et al., Comments on Proposed Agreement and Consent Order 1 (Dec. 17, 2014).

¹⁵ *In the Matter of True Ultimate Standards Everywhere, Inc.*, Decision and Order, Docket No. C-4512, FTC (Mar. 12, 2015) [*hereinafter* Consent Decree].

evaluations, certifications, reviews, and recertifications; (3) its corporate status and independence; and (4) the extent to which its Operators are a member of, adhere to, comply with, are certified by, are endorsed by, or otherwise participate in TRUSTe's program.¹⁶

Beginning in August 2015, while the FTC Consent Decree was in full effect, the NYAG conducted an investigation of TRUSTe's Operator certification practices. The NYAG instituted its investigation after an investigation into two Operators who had used TRUSTe's certification program revealed that they were not in compliance with COPPA.¹⁷ The NYAG found that TRUSTe was not adhering to its stated policies and procedures for administering the certification process of its Safe Harbor program.¹⁸ Specifically, the NYAG found that TRUSTe: (1) did not scan most or all of the child-directed webpages on some of its Operator's websites for third-party trackers; (2) did not disclose to its Operators most or all of the third-party trackers detected by the scans it did conduct; (3) did not make a reasonable determination on whether the third-party tracking violated COPPA; and (4) failed to complete an annual assessment for at least one of its Operators.¹⁹ Ultimately, as a result of this investigation, TRUSTe reached a settlement agreement with the NYAG requiring it to make a number of changes to its COPPA Safe Harbor program.²⁰

¹⁶ *Id.* at 2-3. The Consent Decree expires in 2035.

¹⁷ Angelique Carson, *New York AG settles with TRUSTe over COPPA safe harbor program*, IAPP (Apr. 6, 2017), <https://iapp.org/news/a/new-york-ag-settles-with-truste-over-coppa-safe-harbor-program/>.

¹⁸ *In the Matter of True Ultimate Standards Everywhere, Inc.*, Assurance of Discontinuance, Assurance No. 17-049, New York Attorney General's Office 2-3 (Mar. 24, 2017) [*hereinafter* Assurance of Discontinuance].

¹⁹ *Id.* at 6.

²⁰ *See id.* at 12-17.

II. The FTC Should Investigate Whether TRUSTe Violated Its 2015 Consent Decree

In a letter responding to CDD and CCFC's comments requesting the FTC strengthen the Consent Decree, the Commission stated that the Consent Decree "contains provisions designed to prevent TRUSTe from committing future violations similar to those alleged in the complaint."²¹ However, the facts alleged in the NYAG Assurance of Discontinuance strongly suggest that TRUSTe has violated its Consent Decree with the FTC in several ways.

First, the Consent Decree requires that TRUSTe not misrepresent the "steps it takes to evaluate, certify, review, or recertify" its Operators.²² According to the NYAG, TRUSTe "marketed the scanning process in its Children's Privacy Program to potential clients as a means of identifying third party tracking technologies,"²³ but TRUSTe "failed to conduct complete electronic scanning of most or all of the child-directed webpages on some of its clients' websites."²⁴ The NYAG also found that TRUSTe "represented that it had conducted an electronic scan and indicated that the report contained a comprehensive list of third party tracking technologies that had been detected"²⁵ when in actuality it "did not disclose to some of its clients most or all of the third party tracking technologies detected by the electronic scans."²⁶ Further, the NYAG concluded that TRUSTe "did not make a reasonable determination as to whether third party tracking technologies present on [its Operators'] websites violated

²¹ Letter to Angela J. Campbell, Institute for Public Representation, from Donald S. Clark, Secretary, FTC (Mar. 12, 2015), <https://www.ftc.gov/system/files/documents/cases/150318trust-eletters.pdf>.

²² Consent Decree at 2.

²³ Assurance of Discontinuance at 8.

²⁴ Assurance of Discontinuance at 6.

²⁵ Assurance of Discontinuance at 8.

²⁶ Assurance of Discontinuance at 6.

COPPA,”²⁷ and that TRUSTe “certif[ied] child-directed websites despite information indicating that third parties present on those websites collected and used personal information of users in a manner prohibited by COPPA,” even ignoring information in some cases that indicated that third party tracking was present.²⁸

Second, the Consent Decree requires that TRUSTe not misrepresent the “extent to which [an Operator] is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy program sponsored by [TRUSTe].”²⁹ TRUSTe engages in such misrepresentation when it allows its Operators to keep its certification seal on its website when they are not in fact compliant with COPPA. According to the NYAG, TRUSTe represented “that it provides an effective mechanism for assessing operators’ compliance with the company’s requirements for its Children’s Privacy Program” and “that customers certified by the company complied with the COPPA Rule.”³⁰ But as discussed above, the NYAG found that TRUSTe “did not implement a comprehensive review of its customers’ websites prior to certifying companies,” and therefore, that it “certified customers that did not comply with the requirements of TRUSTe’s [S]afe [H]arbor program of the COPPA Rule.”³¹ As a result, TRUSTe allowed its Operators to keep its certification seal on their websites, thereby misrepresenting the extent to which its Operators adhere to and comply with TRUSTe’s program.

Third, the Consent Decree requires that TRUSTe not misrepresent the “frequency with which [it] conducts any such evaluation, certification, review, or recertification” of its

²⁷ Assurance of Discontinuance at 6.

²⁸ Assurance of Discontinuance at 8-9.

²⁹ Consent Decree at 3.

³⁰ Assurance of Discontinuance at 11-12.

³¹ *Id.* at 12.

Operators.³² Failing to conduct timely reviews can have a broad impact because Operators can own multiple websites, each with a substantial number of web pages. The NYAG found that “TRUSTe failed to timely complete an annual review for *at least* one of its clients.”³³ This company, Roblox, is “the largest user-generated online gaming platform, [with] over 15 million games created by users,” making it “the #1 gaming site for kids and teens.”³⁴

These apparent violations are highly material because they go to the fundamental question of whether TRUSTe can be relied upon by the FTC and the public to take the steps necessary to ensure that children’s privacy is protected.

III. Conclusion and Request for Relief

CDD and CCFC ask that the FTC investigate whether TRUSTe has violated the Consent Decree that it entered into with the FTC in 2015 by misrepresenting its certification procedures. Further, they ask that, pending the outcome of the investigation, the FTC suspend TRUSTe’s authority to operate its COPPA Safe Harbor program. If the investigation confirms that TRUSTe has violated the Consent Decree or any provisions of the COPPA Rule, the FTC should take all appropriate enforcement actions available to it under the Consent Decree and §312.11 of the COPPA Rule including permanent revocation of TRUSTe’s authority to operate a COPPA Safe Harbor program.

³² Consent Decree at 2.

³³ Assurance of Discontinuance at 6. (emphasis added)

³⁴ Roblox, <https://www.roblox.com/> (last visited May 24, 2017).

Respectfully submitted,

/s/

Chris Laughlin
Angela Campbell
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, NW, Suite 312
Washington, DC 20001
(202) 662-9547

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*Counsel for Center for Digital Democracy and
Campaign for a Commercial-Free Childhood*